

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

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STEPHAN HARRIS, CLERK
CASPER

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 19-CR-15-S

JOSHUA SCOTT RICHARDS,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS

This matter came before the Court on the Defendant's Motion to Suppress (Doc. 22) and the Government's response (Doc. 28). An evidentiary hearing on the motion was held on March 25, 2019. Having considered the evidence and argument presented, reviewed the record herein, and being otherwise fully advised, the Court finds and concludes the motion should be denied.

BACKGROUND

Defendant Joshua Richards was indicted on one count of knowingly accessing with intent to view material containing child pornography in violation of 18 U.S.C. § 2252A.

Around August 27, 2018, Tumblr, a blogging and social networking website, submitted a "Cybertip" to the National Center for Missing and Exploited Children (NCMEC), reporting that a Tumblr user had uploaded 49 image and video files depicting suspected child pornography to the Tumblr website. Tumblr also provided

copies of those 49 files to the NCMEC. The NCMEC then forwarded the Cybertip along with the 49 files to Special Agent Shannon Patak of Homeland Security Investigations (HSI), who is also assigned to the Wyoming Intent Crimes Against Children (ICAC) Taskforce of the Wyoming Division of Criminal Investigation (DCI). Special Agent Patak viewed those 49 files and determined the majority of them depicted suspected child pornography.

The Cybertip identified the Tumblr user as “archy1981,” included the user’s email address associated with the Tumblr website, and identified two unique Internet Protocol (IP) addresses that were used to log into the “archy1981” Tumblr account in August 2018. In September 2018, HSI Special Agent Nicole Bailey, also assigned to the Wyoming ICAC Taskforce, issued an administrative summons to Charter Communications that sought the information associated with the two IP addresses that had been used to log into the “archy1981” Tumblr account. Charter Communications reported one of the IP addresses was assigned to “Josh Richards” and the other to the Teton Pines Country Club, both in Teton County, Wyoming.

With this information, Special Agent Patak applied for a search warrant that required Tumblr to disclose all the information it had associated with the “archy1981” Tumblr account. (Doc. 22-1 at pp. 4-5.) From that information, the search warrant sought to seize “All information ... that constitutes fruits, evidence, and instrumentalities of violations of 18 U.S.C. §§ 2252 and 2252A.” (*Id.* at pp. 5-6.) A federal magistrate judge granted the search warrant application, and Tumblr provided the account information to the Wyoming DCI.

ISSUE

Mr. Richards seeks to suppress the evidence seized from that search warrant, arguing the warrant lacked sufficient particularity to satisfy the Fourth Amendment because it failed to restrict the search to data from specific dates. Mr. Richards contends the government should not have been allowed to obtain all data from his Tumblr account, saying it was a “needlessly broad request” that resulted in a “needlessly broad warrant.” (Doc. 22 at p. 3.)

ANALYSIS

The Fourth Amendment protects a citizen’s right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and provides that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to searched, and the persons or things to be seized.” U.S. Const. amend. IV. The “manifest purpose” of the particularity requirement within the Fourth Amendment is to prevent general searches. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

1. The Government waived any Fourth Amendment standing issues.

A search implicating the Fourth Amendment only occurs where there is “actual intrusion into a constitutionally protected area.” *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The classic two-part test for determining whether a defendant had a Fourth Amendment protection in searched area asks: (1) “whether the defendant manifested a subjective expectation of privacy in the area searched,” and (2) “whether society is prepared to recognize that expectation as objectively reasonable.” *United States v. Johnson*, 548 F.3d 995, 999 (10th Cir. 2009).

The question of whether Mr. Richards has standing to seek suppression exists in this case, but was not addressed by the parties in their briefing. Other courts have found that a social media user does not have an objective expectation of privacy in the files they upload to a social media platform. *See United States v. Stratton*, 229 F. Supp. 3d 1230, 1240-42 (D. Kan. 2017); *United States v. Ackerman*, 296 F. Supp. 3d 1267, 1271-73 (D. Kan. 2017). However, Fourth Amendment standing is not jurisdictional, and though the burden is on the defendant to establish his standing, the Government may waive the issue by failing to raise it. *United States v. Dewitt*, 946 F.2d 1497, 1499-1500 (10th Cir. 1991). And such is the case here.

2. Assuming Mr. Richards has Fourth Amendment standing, the search warrant here was sufficiently particular.

The particularity requirement “ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The Tenth Circuit requires “warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.” *United States v. Otero*, 563 F.3d 1127, 1132 (10th Cir. 2009) (emphasis in original) (quoting *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005)).

“Attachment B” of the search warrant application, which identifies the area of the search and the items to seized, is broken into two sections. (Doc. 22-1 at pp. 4-6.) Section I is titled “Information to be disclosed by Tumblr, Inc.” and Section II is titled “Information to be seized by the government.” (*Id.*) Section I essentially identifies the entire contents of the “archy1981” Tumblr account as the information that must

be turned over to the Wyoming DCI. (*See id.* at pp. 4-5.) Section II, in contrast, limits the government's seizure of evidence to "[a]ll information described above in Section I ... that constitutes fruits, evidence, and instrumentalities of violations of 18 U.S.C. §§ 2252 and 2252A." (*Id.* at p. 5.) Section II also sets forth several categories of potential evidence, but all of them are limited by the requirement to search for evidence of the identified federal crimes. (*Id.* at p. 6.) Consequently, the Court concludes the search warrant affirmatively limits the seizure of items by the government to that constituting evidence of specific federal crimes, which satisfies the particularity requirement of the Fourth Amendment.

As Mr. Richards points out, the warrant was not limited to a specific date range, which is one method of limiting a search for electronic information. Date restrictions are not required, though, and a lack of date restriction does not render an otherwise particular warrant invalid. *See, e.g., United States v. Loera*, 59 F. Supp. 3d 1089, 1153 (D.N.M. 2014) (noting that "multiple Tenth Circuit cases have found search warrants sufficiently particular despite not specifying a date range") (collecting cases). "In cases in which courts have either denied a search warrant for the entirety of an email account or suppressed evidence based on an overbroad search warrant, the warrants lacked particularity, for example, in identifying a specified date range or referencing the violation of a specific criminal statute." *In the Matter of Search of Info. Associated with Email Addresses Stored at Premises Controlled by the Microsoft Corp.*, 212 F. Supp. 3d 1023, 1036 (D. Kan. 2016) (emphasis added). Here, while there was no specified date range, the warrant still satisfied the Fourth Amendment's particularly requirement because it referenced the violation of a

specific criminal statute and sought information specific to that suspected violation. A date restriction surrounding the date the “archy1981” user allegedly uploaded possible child pornography to the Tumblr website (“on or about August 27, 2018”) certainly would have been appropriate, but the law does not require the government to employ the least restrictive means in executing a search warrant. *United States v. Loera*, 59 F. Supp. 3d 1089, 1157 (D.N.M. 2014) (citing *United States v. Brooks*, 427 F.3d 1246, 1251 (10th Cir. 2005)); *see also Brooks*, 427 F.3d at 1252-53 (determining a search of a computer “for evidence of child pornography” was not overly broad in violation of the Fourth Amendment). The search warrant in this case satisfied the Fourth Amendment’s particularity requirement because it sought evidence of child pornography.

3. **Even if the search warrant was unconstitutionally broad, suppression is not warranted under *United States v. Leon*’s good faith exception.**

The Supreme Court explained in *United States v. Leon*, 468 U.S. 897 (1984), “If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.” *Id.* at 919.

There is no evidence here of deliberate, reckless, or grossly negligent conduct by DCI. *See Herring v. United States*, 555 U.S. 135, 145 (2009) (“the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct”). When applying for the Tumblr search warrant, Special Agent Patak intended to limit the government’s seizure of Mr. Richards’ Tumblr information to that constituting

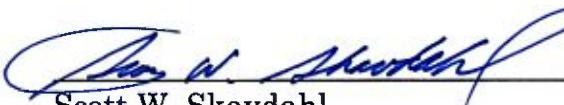
evidence of the federal crime of trafficking in or knowingly accessing child pornography. And it was Tumblr's report to the NCMEC that set the investigation into motion, not any inappropriate or unwarranted law enforcement focus on Mr. Richards. Finally, Mr. Richards has not pointed to any evidence to suggest law enforcement had any reason to believe the warrant was invalid when they executed it. "A warrant issued by a magistrate normally suffices to establish that a law enforcement officer has acted in good faith in conducting the search." *Leon*, 468 U.S. at 922.

CONCLUSION AND ORDER

Mr. Richards' motion to suppress must be denied. Assuming without deciding that he has standing to challenge the search at issue here, the search warrant met the Fourth Amendment's particularity requirement because it affirmatively limited the seizure of items by the government to that constituting evidence of specific federal crimes. Additionally, even if the search warrant violated the Fourth Amendment by being overly broad, the good faith exception under *Leon* proscribes suppression because law enforcement relied in good faith on what appears to be a facially-valid warrant.

IT IS THEREFORE ORDERED that the Defendant's Motion to Suppress (Doc. 22) is DENIED.

DATED: March 25⁷⁴, 2019.



Scott W. Skavdahl
United States District Judge